

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ABULAY NIAN,

Petitioner,

v.

**WARDEN, NORTH CENTRAL
CORRECTIONAL COMPLEX,**

Respondent.

**Case No. 2:17-cv-313
JUDGE JAMES L. GRAHAM
Magistrate Judge King**

ORDER

This is an action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 16, 2018, the United States Magistrate Judge recommended that Petitioner's claims be dismissed, as either without merit or as procedurally defaulted. *Report and Recommendation*, ECF No. 8. Petitioner has objected to that recommendation. *Objection*, ECF No. 9. The Court will consider the matter *de novo*. See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b).

Petitioner challenges his conviction, following a jury trial in the Franklin County Court of Common Pleas, on a charge of rape. He asserts in this action that his conviction is against the manifest weight of the evidence and that the evidence is constitutionally insufficient to sustain his conviction (claim one); that he was denied a fair trial due to prosecutorial misconduct during closing argument (claim two); that he was denied the right to a fair and impartial jury (claim three); that he was denied the effective assistance of trial counsel (claim four); that the trial court erred in instructing jurors to disregard statements by defense counsel regarding Petitioner's citizenship (claim five); and that the trial court erred in instructing jurors regarding the offense of rape (claim six). As noted, the Magistrate Judge recommended dismissal of Petitioner's claims as either procedurally defaulted or without merit. In his objections, Petitioner presents only the

same arguments that he previously presented and which the Magistrate Judge found unpersuasive.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons already addressed in the Magistrate Judge's *Report and Recommendation*, Petitioner's *Objection* (ECF No. 9) is **OVERRULED**. The *Report and Recommendation* (ECF No. 8) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, —U.S. —. —, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal).

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of Petitioner's claims as procedurally defaulted or without merit. The Court therefore **DECLINES** to issue a certificate of appealability.

The Court also **CERTIFIES**, pursuant to 28 U.S.C. § 1915(a)(3), that the appeal would not be in good faith and that an application to proceed on appeal *in forma pauperis* would be **DENIED**.

The Clerk is **DIRECTED** to enter final **JUDGMENT**.

IT IS SO ORDERED.

Date: September 7, 2018

s/James L. Graham
JAMES L. GRAHAM
United States District Judge